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Pretrial Preventive Detention Under the Bail Reform Act of 1984

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PRETRIAL PREVENTIVE DETENTION UNDER THE BAIL REFORM ACT OF 1984

The Bail Reform Act of 1984[1] authorizes preventive detention[2] of adult criminal defendants pending trial[3] and pending sentence or appeal.[4] This Note addresses the constitutionality of pretrial preventive detention under the eighth amendment's excessive bail clause[5] and the fifth amendment's due process clause.[6] This Note concludes that the 1984 Act is constitutional on both grounds.[7]

I. AN OVERVIEW OF THE BAIL REFORM ACT OF 1984

The Bail Reform Act of 1984 represents a major policy change from the Act that it repeals and replaces, the Bail Reform Act of 1966.[8] Despite the policy shift, many of the procedural provisions of the 1984 Act are similar to those of the 1966 Act.

Under the 1984 Act, the judicial officer authorized to order arrests retains the power to release or detain the arrested person prior to trial.[9] The judicial officer may issue one of four orders during the arrested person's first court appearance:[10] (1) release on personal recognizance or

1. Bail Reform Act of 1984, Pub. L. No. 98-473, § 202-10, 98 Stat. 1976-87 (1984) (codified at 18 U.S.C. §§ 3141-50). For an informative overview of the Comprehensive Crime Control Act, which contains the Bail Reform Act, see generally 22 AM. CRIM. L. REV. (1985) and especially Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984,* 22 AM. CRIM. L. REV. 805 (1985).

2. As used in this note, preventive detention means retention in custody of a person on the ground that his release would pose a danger to other people or to the community.

3. The sections of the Bail Reform Act of 1984 pertaining to preventive detention of persons pending trial are 18 U.S.C. §§ 3141(a), 3142(a)(4), and 3142(e).

4. The sections of the Bail Reform Act of 1984 pertaining to preventive detention of persons pending sentence or appeal are 18 U.S.C. §§ 3141(b) and 3143. Prior to the Bail Reform Act of 1984, only § 3148 of the Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3151, *repealed by* Bail Reform Act of 1984, authorized preventive detention. Congress limited § 3148 to capital cases.

5 *See infra* notes 38-66 and accompanying text.

6. *See infra* notes 67-122 and accompanying text.

7. *See infra* text accompanying note 123.

8. Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3151, *repealed by* Bail Reform Act of 1984. For a general discussion of the 1966 Act, see Legislation, *Bail Reform in the State and Federal Systems,* 20 VAND. L. REV. 948 (1967).

9. 18 U.S.C. § 3141(a). In the 1984 Act the term "judicial officer" is not limited to judges. *See* 18 U.S.C. § 3041 (discussing individuals authorized to make arrests). *Compare* § 3141 of the Bail Reform Act of 1966 (limiting the power to determine bail in capital cases to judges).

10. 18 U.S.C. § 3142(f) (reprinted *infra* note 16). The Act authorizes postponement of the hearing if either the arrested person or the government requests a continuance. *Id.*

upon execution of an unsecured appearance bond,[11] (2) release on conditions,[12] (3) temporary detention,[13] or (4) detention.[14]

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11. 18 U.S.C. § 3142(a)(1). 18 U.S.C. § 3142(b) provides that release on this order is subject to the condition that the person abide by federal, state and local laws during his release.

The Bail Reform Act of 1966 provided for a similar order; however, it allowed the judicial officer to consider only assurance of the appearance of the arrested person in court. 18 U.S.C. § 3146(a), *repealed by* Bail Reform Act of 1984. See Annot., 8 A.L.R. FED. 586 (1971), for a general discussion of § 3146 of the Bail Reform Act of 1966.

12. 18 U.S.C. § 3142(a)(2). 18 U.S.C. § 3142(c) describes the possible conditions of release:

> (c) If the judicial officer determines that the release [conditioned on compliance with federal, state and local law] will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—
>
> (1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and
>
> (2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—
>
> (A) remain in the custody of a designated person . . .;
>
> (B) maintain employment, or, if unemployed, actively seek employment;
>
> (C) maintain or commence an educational program;
>
> (D) abide by specified restrictions on his personal associations, place of abode, or travel;
>
> (E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
>
> (F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
>
> (G) comply with a specified curfew;
>
> (H) refrain from possessing a firearm, destructive device, or other dangerous weapon;
>
> (I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance . . . without a prescription by a licensed medical practitioner;
>
> (J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
>
> (K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, . . . and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;
>
> (L) execute a bail bond with solvent sureties . . .;
>
> (M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and
>
> (N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The Bail Reform Act of 1966 provided for release on similar but fewer possible conditions, including: placing the arrested person in the custody of another individual; restricting the arrested person's travel, association and abode; requiring an appearance or bail bond; or requiring any other reasonably necessary condition. 18 U.S.C. § 3146(a), *repealed by* Bail Reform Act of 1984.

13. 18 U.S.C. § 3142(a)(3). This section provides temporary detention to allow for revocation of conditional release, deportation or exclusion. 18 U.S.C. § 3142(d) authorizes detention if the judge determines that the arrested person (1) is on release, probation or parole for any offense or is not a United States citizen or lawful permanent resident of the United States; and (2) may flee or pose a danger to others or to the community. Discussion of this type of pretrial detention is beyond the scope of this Note.

Prior to ordering detention, the prosecutor or the judicial officer must make a motion for a hearing. The prosecutor can make a "government motion"[15] if the accused has committed a crime of violence,[16] an offense

14. 18 U.S.C. § 3142(a)(4). 18 U.S.C. § 3142(e) describes the findings necessary for a detention order:

> (e) If, after a hearing pursuant to the provisions of subsection (f) [reprinted *infra* note 16], the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that —
>
> (a)(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in section (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;
>
> (2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and
>
> (3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.
>
> Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, section 1 of the Act of September 15, 1980 [*see infra* note 18 describing the above three statutes], or an offense under section 924(c) title 18 of the United States Code. [*See infra* note 35].

15. This Note uses the terms "government motion" and "government-judicial motion" for convenience. These terms do not appear in the Bail Reform Act of 1984.

16. 18 U.S.C. § 3142(f)(1)(A). Section 3142(f) reads in full:

> (f) The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) [*see supra* note 12] will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case —
>
> (1) upon motion of the attorney for the Government, that involves —
>
> (A) a crime of violence;
>
> (B) an offense for which the maximum sentence is life imprisonment or death;
>
> (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, or section 1 of the Act of September 15, 1980 [*see infra* note 18 for descriptions of these statutes]; or
>
> (D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or
>
> (2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves —
>
> (A) a serious risk that the person will flee;
>
> (B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.
>
> The hearing shall be held immediately upon the person's first appearance before the judi-

with a maximum sentence of life imprisonment or death,[17] an offense involving controlled substances with a maximum sentence of ten or more years imprisonment,[18] or any felony committed after two previous convictions that fall within the above categories.[19] Either the prosecutor or the judicial officer may make a "government-judicial motion" if there is a serious risk that the arrested person will flee,[20] obstruct justice,[21] or threaten, injure or intimidate prospective witnesses or jurors.[22]

Upon either of these motions, the judicial officer holds a hearing to determine whether release upon conditions would reasonably assure the subsequent courtroom appearance of the arrested person and the safety of the community.[23] The judicial officer considers the nature and circumstances of the offense charged,[24] the weight of the evidence against

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cial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and the continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained .... At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

The Act defines a "crime of violence" as:

an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 3150(c)(4).

17. 18 U.S.C. § 3142(f)(1)(B) (reprinted *supra* note 16).

18. 18 U.S.C. § 3142(f)(1)(C) (reprinted *supra* note 16). The Act specifies three statutes that justify a "government motion," including: (1) the Controlled Substances Act, 21 U.S.C. §§ 801-86 (1982) (regulating and enforcing registration of manufacturers, distributors and dispensers of controlled substances); (2) the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951-69 (1982) (regulating the import and export of controlled substances); and (3) § 1 of the Act of September 15, 1980, 21 U.S.C. § 955(a) (1982) (regulating the manufacture, distribution, or possession of controlled substances on board vessels).

19. 18 U.S.C. § 3142(f)(1)(D) (reprinted *supra* note 16). The Act defines a "felony" as "an offense punishable by a maximum term of imprisonment of more than 1 year." 18 U.S.C. § 3150.

20. 18 U.S.C. § 3142(f)(2)(A) (reprinted *supra* note 16).

21. 18 U.S.C. § 3142(f)(2)(B) (reprinted *supra* note 16).

22. *Id.*

23. 18 U.S.C. § 3142(f) (reprinted *supra* note 16).

24. 18 U.S.C. § 3142(g)(1). This section authorizes judges to consider the following information when determining the likelihood of the arrested person's appearance and of community safety:

the arrested person,[25] the history and characteristics of the arrested person,[26] and the nature and seriousness of the danger posed by the arrested person's release.[27] The arrested person has the right to counsel, including appointed counsel if he is indigent; the right to testify; the right to present witnesses and information; and the right to cross-examine prosecution witnesses.[28] If the judicial officer finds clear and convincing evidence[29] that release on conditions will not assure appearance and safety, he must order detention of the arrested person.[30]

The Act establishes two presumptions regarding release on conditions. First, a rebuttable presumption that release on conditions will not assure safety arises if the offense charged could justify a "government motion"[31] and the judicial officer finds that (1) the arrested person was previously convicted of an offense that could justify a "government motion,"[32] (2) the arrested person committed the previous offense while he was on release pending trial for a third offense,[33] and (3) the date of the arrested person's previous conviction or of his release from imprisonment, whichever was later, occurred within the past five years.[34]

The Act provides for a second rebuttable presumption that release on conditions will not assure appearance *and* safety if the judicial officer

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(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including —
(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) whether, at the time of the current offense or arrest, he was on probation, or parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

The Bail Reform Act of 1966 provided for consideration of similar factors with the exception of the factor of dangerousness. 18 U.S.C. § 3146(b), *repealed by* Bail Reform Act of 1984.

25. 18 U.S.C. § 3142(g)(2) (reprinted *supra* note 24). The rules of evidence governing criminal trials do not apply at the detention hearing. 18 U.S.C. § 3142(f) (reprinted *supra* note 16).
26. 18 U.S.C. § 3142(g)(3) (reprinted *supra* note 24).
27. 18 U.S.C. § 3142(g)(4) (reprinted *supra* note 24).
28. 18 U.S.C. § 3142(f) (reprinted *supra* note 16).
29. *Id.*
30. 18 U.S.C. § 3142(e) (reprinted *supra* note 14).
31. *See supra* notes 15-19 and accompanying text.
32. 18 U.S.C. § 3142(e)(1) (reprinted *supra* note 14).
33. 18 U.S.C. § 3142(e)(2) (reprinted *supra* note 14).
34. 18 U.S.C. § 3142(e)(3) (reprinted *supra* note 14).

finds probable cause to believe the arrested person committed an offense under four specified statutes involving controlled substances and firearms.[35]

If the judicial officer concludes that detention is necessary, he must issue a written order containing findings of fact and a statement of reasons for the detention.[36] The court may order temporary release of the detainee if it determines that release is necessary for preparation of the detainee's defense or for other compelling reasons.[37]

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35. 18 U.S.C. § 3142(e) (reprinted *supra* note 14). See *supra* note 18 for descriptions of the three statutes expressly stated in § 3142(e): the Controlled Substances Act, the Controlled Substances Import and Export Act, and the Act of September 15, 1980. The fourth statute specified in § 3142(e) covers the use or possession of a firearm during the commission of a felony. 18 U.S.C. § 924(c) (1982).

36. 18 U.S.C. § 3142(i)(1). Subsection (i) provides:

> (i) In a detention order issued pursuant to the provisions of subsection (e) [*see supra* note 14], the judicial officer shall —
>
> (1) include written findings of fact and a written statement of the reasons for the detention:
>
> (2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
>
> (3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and
>
> (4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.
>
> The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for the preparation of the person's defense or for another compelling reason.

18 U.S.C. § 3145(b) and (c) provide for review of and appeal from detention orders, respectively:

> (b) If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.
>
> (c) An appeal from a . . . detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 [granting jurisdiction in courts of appeals over final decisions] and section 3731 of this title [outlining procedures for appeals by the government]. The appeal shall be determined promptly.

In United States v. Delker, 757 F.2d 1390 (3rd Cir. 1985), the Third Circuit noted that the Bail Reform Act of 1984 does not set forth the scope of review by district or appellate courts. The court approved de novo review of magistrate determinations by district courts. *Id.* at 1395. Limiting appellate review to the trial court record, the *Delker* court held that appellate courts may amend and reverse trial court determinations. *Id.* at 1400. *See also* United States v. Beesley, 601 F. Supp. 82, 83 (N.D. Ga. 1984) (the standard of district court review of magistrate decisions is full consideration).

37. 18 U.S.C. § 3142(i) (reprinted *supra* note 36).

II. THE EIGHTH AMENDMENT RIGHT TO BAIL

The eighth amendment of the United States Constitution guarantees that "excessive bail shall not be required. . . ."[38] Courts disagree on the proper interpretation of the excessive bail clause. Some courts hold that the eighth amendment provides a defendant with an absolute right to bail.[39] This interpretation prohibits pretrial preventive detention. Other courts hold that the eighth amendment only guarantees that if a judge imposes bail, it must not be excessive.[40] These courts argue that preventive detention is constitutional because the eighth amendment does not preclude a total denial of bail.

The Supreme Court has never directly decided which interpretation of the eighth amendment is correct. In *Stack v. Boyle*,[41] the Court upheld defendant's claim of excessive bail, noting the defendant's "traditional right to freedom before conviction."[42] In *Carlson v. Landon*,[43] however,

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38. U.S. CONST. amend. VIII.

For discussions of the history of bail rights, see generally Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965); Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125 (1965); Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36 (1970); Meyer, *Constitutionality of Pretrial Detention* (pt. I), 60 GEO. L.J. 1139 (1972) [hereinafter cited as Meyer I] Meyer, *Constitutionality of Pretrial Detention* (pt. II), 60 GEO. L.J. 1381 (1972) [hereinafter cited as Meyer II]; Portman, *"To Detain or Not to Detain?"—A Review of the Background, Current Proposals, and Debate on Preventive Detention*, 10 SANTA CLARA L. REV. 224 (1970); Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966); Legislation, *supra* note 8.

39. *See, e.g.*, Trimble v. Stone, 187 F. Supp. 483, 485 (D.D.C. 1960) ("The [eighth amendment] right to bail pending trial is absolute, except in capital cases, no matter how vicious the offense or how unsavory the past record of the defendant."). See also *infra* notes 41-42 & 47 and accompanying text, for a discussion of the Supreme Court's dictum in Stack v. Boyle, 342 U.S. 1 (1951).

Many states have state constitutional provisions granting an absolute right to bail except in capital cases. *See* Annot., 75 A.L.R.3d 956 (1977). *See generally* Legislation, *supra* note 8.

40. *See, e.g.*, Carlson v. Landon, 342 U.S. 524 (1952) (discussed *infra* notes 43-45); United States v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985) (rejecting absolute right to bail under the eighth amendment); Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981) (discussed *infra* note 44), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982).

41. 342 U.S. 1 (1951). In *Stack*, petitioners moved to reduce bail on the ground that it was excessive under the eighth amendment. *Id.* at 3. The Court granted the petitioners' motion and remanded the case, directing the trial judge to establish a bail amount that would assure petitioners' appearances. *Id.* at 5.

42. *Id.* at 4. The Court noted that:

> [f]rom the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of pun-

the Supreme Court upheld a denial of bail to potentially deportable aliens. The Court stated that the framers of the eighth amendment intended that if bail were granted, it must not be excessive.[44] In addition, the *Carlson* Court implicitly refuted the concept of an absolute right to bail, noting that Congress authorizes denial of bail in certain cases.[45] Although some courts rely on *Stack* to support an absolute right to bail,[46] other courts dismiss *Stack*'s "traditional right" language as dictum that identifies a right that is statutory, not constitutional.[47] These courts rely primarily on the *Carlson* decision.

The legislative history of the eighth amendment indicates that the right to bail is not absolute. The First Congress held concurrent debates on the proposed Bill of Rights and the proposed Judiciary Act of 1789.[48] The Bill of Rights was to contain the excessive bail clause, while the Judiciary Act was to limit the right to bail in certain circumstances.[49]

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ishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4 [citations omitted].

43. 342 U.S. 524 (1952).

44. *Id.* at 545. Holding that detention did not violate the eighth amendment, the *Carlson* Court commented:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

Id. at 545-46 [citations omitted.] *But see* Hunt v. Roth, 648 F.2d 1148, 1159-60 (8th Cir. 1981) (arguing that the American concept of bail differs significantly from English law), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982). Later courts refused to limit *Carlson* to civil deportation proceedings against aliens, adopting the reasoning rejecting an absolute right to bail. *See, e.g.,* United States v. Hazzard, 598 F. Supp. 1442 (N.D. Ill. 1984) (discussed *infra* note 47).

45. 342 U.S. at 545-46.

46. *See supra* note 41.

47. *See, e.g.,* United States v. Hazzard, 598 F. Supp. 1442 (N.D. Ill. 1984). In *Hazzard*, a magistrate ordered pretrial preventive detention of the defendant. *Id.* at 1447. Upholding the order, the district court noted that the Supreme Court's reference in Stack v. Boyle, 342 U.S. 1 (1951), to a traditional right "is dicta, or at most shows the importance of setting reasonable bail for *bailable* offenses." The *Hazzard* court stated that the Supreme Court's reliance on statutory law "makes [it] clear that the 'traditional right' the Court speaks of is a statutory, not constitutional, right." *Id.* at 1448.

48. S. REP. No. 147, 98th Cong., 1st Sess. 1, 7 (1983).

49. The Judiciary Act of 1789 granted the trial court the discretion to deny bail in capital cases:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the Supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their

The First Congress ultimately passed the Bill of Rights prior to passing the Judiciary Act of 1789.[50] Thus, the Bill of Rights' legislative history suggests that the eighth amendment should not be construed as absolute and as thereby defeating Congress' power to determine which offenses are bailable. Congress immediately exercised such a power in passing the Judiciary Act of 1789.[51]

Colonial and state history also supports the view that the eighth amendment does not guarantee an absolute right to bail.[52] The earliest colonial bail provision, appearing in the Massachusetts Body of Liberties of 1641, granted a limited right to bail.[53] Further, many early state constitutions contained separate right to bail and excessive bail clauses,[54] suggesting that the Framers did not believe that an excessive bail clause

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discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law.

Judiciary Act of 1789, 1 Stat. 73, 91.

50. The First Congress passed the Bill of Rights on September 21, 1789, and the Judiciary Act of 1789 on September 29, 1789. S. REP. No. 147, 98th Cong., 1st Sess. 1, 7 (1983).

51. *Id.* at 7.

In Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982), the court held that a Nebraska constitutional provision denying bail to persons charged with certain sex offenses violated the federal constitution. The state urged that the contemporaneous passage of the Judiciary Act of 1789 indicates that "the framers of the Bill of Rights were well aware that the right to bail could be legislatively denied." 648 F.2d at 1160. The court acknowledged the legislative power to deny bail in capital cases, but questioned the existence of such power in noncapital cases. *Id.*

In United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982), the court addressed Edwards' argument that the eighth amendment created an absolute right to bail:

> Although the Eighth Amendment and the statutory right to bail may have developed from two distinct sources, and there is nothing in the congressional record to suggest that the implications of the differing language were addressed, it must be presumed that Congress recognized the clear difference in scope of the clauses. The alternative explanation, that the clearly differing language was fortuitous, cannot be simply inferred without any evidence that Congress intended the differing language to carry the same meaning. Moreover, the right to bail in the 1789 Act would have been a redundancy if the excessive bail language meant the same thing even in capital cases.

Id. at 1329 [citations omitted]. *See generally* Comment, *Preventive Detention and Burdening the Innocent,* 32 AM. U.L. REV. 191 (1982).

52. *See generally* United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982); Cogan, *The Pennsylvania Bail Provisions: The Legality of Preventive Detention,* 44 TEMP. L.Q. 51 (1970).

53. MASS. CONST. of 1780, pt. 1, art. XXVI, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49 (W. Swindler ed. 1975). The constitutional bail provision did not designate bail for capital crimes, contempts of court, or other instances expressly designated by the legislature. *Id.* at 49.

54. *See generally* Meyer I, *supra* note 38, at 1191.

granted a right to bail.[55]

Courts and legislatures have long delineated specific circumstances in which judges may deny bail.[56] The first circumstance involves defendants charged with capital offenses.[57] Many nineteenth-century state constitutions,[58] as well as the Bail Reform Act of 1966,[59] authorized denial of bail in capital cases.[60] The Bail Reform Act of 1966 provided for detention in capital cases if the judge had reason to believe that conditional release would not reasonably assure the arrested person's appearance at trial or the safety of the community.[61]

Second, courts traditionally justify denial of bail if the release of the arrested person might result in harm to witnesses. In *Fernandez v. United States*,[62] Justice Harlan upheld a trial court's revocation of bail because the defendants allegedly threatened witnesses. Justice Harlan

55. United States v. Edwards, 430 A.2d 1321, 1328 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

56. Courts uniformly reject arguments that the Framers intended the eighth amendment as a limitation on legislative power. The court in *Edwards* explained:

> The historical origins of the excessive bail clause, as well as its narrow language, indicate that its primary purpose is to limit the judiciary. The major reason advanced for construing the clause as directed to Congress (and thus as a broader limitation on its powers) is the constitutional context of the Bill of Rights itself. The Bill of Rights, it is argued, had as its 'central concern . . . protection against abuse by Congress.' . . . A cursory examination of other provisions contained in the Bill of Rights, however, reveals that the conduct of the judicial branch was an important, if not the chief, concern.

430 A.2d at 1330.

57. The *Edwards* court referred to this exception as "longstanding and well-accepted." *Id.* at 1326 n.6.

58. The Pennsylvania Constitution provided "[t]hat all persons shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great." PA. CONST. of 1776, § 28, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 283 (W. Swindler ed. 1979); *See also* N.C. CONST. of 1776, art. XXXIX, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 407 (W. Swindler ed. 1978).

59. Bail Reform Act of 1966, 18 U.S.C. § 3148, *repealed by* Bail Reform Act of 1984.

60. Former Attorney General John N. Mitchell argues that legislatures developed the capital crimes exception because of the potential danger posed by persons charged with capital crimes: "[I]t is reasonable to conclude that anticipated danger to other persons or the community was a substantial motivating factor in legislative decisions to make bail unavailable to certain classes of dangerous offenders." Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1225 (1969). Professor Lawrence H. Tribe, on the other hand, argues that legislatures based the capital crimes exception on the belief that a person facing a possible death penalty would rather forfeit bail and not appear for trial: "The most plausible explanation for pretrial detention of alleged capital offenders is the assumption that few men facing the death penalty can be trusted to appear for trial." Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 377 (1970).

61. 18 U.S.C. § 3148, *repealed by* Bail Reform Act of 1984.

62. 81 S. Ct. 642 (1961). In *Fernandez*, four of nineteen defendants applied for release on bail while awaiting trial for conspiracy to violate federal narcotics laws. *Id.* at 643. The district court

held that courts have authority, as part of their inherent supervisory power over the courtroom, to revoke bail during a noncapital trial in order to assure a proper and fair trial.[63] In *Gilbert v. United States*,[64] the United States Court of Appeals for the District of Columbia Circuit extended courts' inherent power to deny bail to the pretrial stage.[65] In 1970, Congress codified the authority of the District of Columbia courts to detain an arrested person who either attempted or successfully threatened, injured, or intimidated prospective witnesses or jurors.[66]

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judge revoked the defendants' bail because one or more defendants allegedly threatened a prosecution witness, tampered with another prosecution witness, and jumped bail. *Id.* at 643.

63. *Id.* at 644. Justice Harlan denied the applications for release, holding that "on principle, District Courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice." *Id.* He cited United States v. Rice, 192 F. 720 (C.C.N.Y. 1911), as the only precedent directly on point. *Id.* at 285.

64. 425 F.2d 490 (D.C. Cir. 1969).

65. *Id.* at 491-92. In *Gilbert*, the trial court detained a defendant charged with assault with intent to kill on the ground that the defendant allegedly threatened to kill the complaining witness. The appellate court noted that even in noncapital cases, the right to bail is not "literally absolute." *Id.* at 491.

The Sixth Circuit also recognized that potential harm to witnesses justified detention. In United States v. Wind, 527 F.2d 672 (6th Cir. 1975), the court rejected the defendant's argument that his pretrial danger to witnesses was irrelevant because the government charged him with a noncapital offense. In reaching its decision, the court relied on the legislative history of the Bail Reform Act of 1966, 18 U.S.C. § 3141-3151, *repealed by* Bail Reform Act of 1984, which indicated that Congress intended to avoid the issue of pretrial detention in noncapital cases:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pretrial period, or because the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence.

H.R. REP. NO. 1541, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2293, 2296. Ultimately, the court vacated the district court's detention order on other procedural grounds. 527 F.2d at 675-76.

The Sixth Circuit appeared to limit *Wind* to its facts in United States v. Bigelow, 544 F.2d 904 (6th Cir. 1976). In *Bigelow*, the defendant allegedly mailed a threatening letter to President Gerald R. Ford. The district court denied Bigelow's motion for release, finding that Bigelow was dangerous and would pose a serious threat to President Ford's life. The Sixth Circuit, however, vacated the detention order, stating that Bigelow had "neither threatened witnesses nor . . . taken any steps or made any threats that would hazard an orderly trial . . . ." *Id.* at 908.

In United States v. Graewe, 689 F.2d 54 (6th Cir. 1982), the Sixth Circuit affirmed a denial of pretrial bail to a defendant who had previously committed retaliatory murders and whose associates made recent threats to witnesses. The court emphasized the need to protect the administration of justice: "By protecting witnesses before trial through a defendant's detention, the court is encouraging those witnesses and other potential witnesses to come forward and provide information helpful to the implementation of justice." *Id.* at 57.

66. D.C. CODE ANN. § 23-1322(a)(3) (1981). This section reads:

Courts addressing the constitutionality of the Bail Reform Act of 1984 should hold that the eighth amendment does not guarantee an absolute right to bail. This conclusion is buttressed by the lack of explicit constitutional language granting a right to bail, the legislative history of the eighth amendment, the early history of bail rights, and the statutes and caselaw authorizing denial of bail in certain circumstances. Absent an absolute right to bail, the pretrial preventive detention provisions of the Bail Reform Act of 1984 do not violate the eighth amendment.

III. THE FIFTH AMENDMENT

Some courts and commentators have argued that pretrial preventive detention violates the fifth amendment's due process guarantee.[67]

A. The Presumption of Innocence

Some authority holds that the fifth amendment's due process guaranty encompasses the presumption of innocence.[68] The presumption directs

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(a) Subject to the provisions of this section, a judicial officer may order pretrial detention of —

(3) a person charged with any offense if such person, for the purpose of obstructing justice or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.

See generally Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act — The Next Step in Bail Reform,* 37 BROOKLYN L. REV. 277 (1971).

The District of Columbia Court of Appeals upheld the constitutionality of § 23-1322(a)(3) in Blunt v. United States, 322 A.2d 579 (D.C. 1974). The trial court detained Blunt because of his lengthy record of violence, his current parole status, and his alleged threats to witnesses. The *Blunt* court cited *Gilbert* (*see supra* note 64 & 65 for the principle that "a trial court is not prevented from acting to protect a witness from threats by a defendant, and thus safeguarding the integrity of its own process." *Id.* at 584. The court further noted that Congress enacted § 23-1322(a)(3) to codify this principle. *See* H.R. REP. No. 907, 91st Cong., 2d Sess. 92 (1970).

Wisconsin, the only other state with an explicit preventive detention statute, codified the authority of its courts to detain defendants who may intimidate witnesses. WIS. STAT. § 969.035(3)(c) (West Supp. 1984-85) provides that a circuit court may deny the release of a defendant from custody if the district attorney "alleges that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses."

67. U.S. CONST. amend. V. The fifth amendment reads in full:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

68. In Taylor v. Kentucky, 436 U.S. 478 (1978), the Supreme Court implied that the presumption of innocence is a constitutional doctrine. The Court held that the trial court's failure to give a jury instruction on the presumption violated the defendant's right to a fair trial. *See also* 2 W.

courts to presume that a person charged with a crime is innocent until proven guilty.[69] Notwithstanding judicial acknowledgement of the importance of this presumption to the criminal justice system,[70] courts limit the presumption to actual trial proceedings.[71] Courts uniformly reject the argument that detaining an arrested person prior to determination of guilt abridges the presumption.[72] Therefore, pretrial preventive detention falls outside the dictates of the presumption, and the Bail Reform Act of 1984 does not violate this aspect of the Constitution.[73]

B. Substantive Due Process

The Bail Reform Act of 1984 raises the fundamental issue whether pretrial preventive detention violates an arrested person's fifth amend-

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LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 12.3 (1984) (it is generally accepted that the presumption of innocence has constitutional stature). *But see* Mitchell, *supra* note 60, at 1231 (the presumption is simply a rule of evidence that allows the defendant to stand mute while placing the burden upon the government to prove the charges against him beyond a reasonable doubt).

69. In Bell v. Wolfish, 441 U.S. 520 (1979), *see infra* note 88, the Supreme Court described the presumption of innocence as:

> a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.

Id. at 533 [citations omitted]. The Supreme Court further described the presumption in Taylor v. Kentucky, 436 U.S. 478 (1978):

> It is now generally recognized that the 'presumption of innocence' is an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . . .'

Id. at 484 n.12 [citations omitted].

70. In Coffin v. United States, 156 U.S. 432 (1895), the Supreme Court noted that "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Id.* at 453. In Bell v. Wolfish, 441 U.S. 520 (1979), *see infra* note 88, the Supreme Court commented that the presumption of innocence plays an important role in our criminal justice system. *Id.* at 533. *See also* Blunt v. United States, 322 A.2d 579 (D.C. 1974).

71. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court noted that the presumption of innocence does not govern the rights of a pretrial detainee. *Id.* at 533. The District of Columbia Court of Appeals in *Blunt* held that "the presumption of innocence, however, has never been applied to situations other than the trial itself." 322 A.2d at 579. *See also* United States v. Hazzard, 598 F. Supp. 1442, 1449 (N.D. Ill. 1984) (described at *supra* note 47).

72. *See supra* note 71.

73. *See* 18 U.S.C. § 3142(j) (forbidding a construction of the Bail Reform Act of 1984 that would affect the presumption of innocence). *See generally* Hruska, *supra* note 38 (discussing the presumption of innocence and pretrial preventive detention); Meyer II, *supra* note 38 (same); Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial,* 1978 WIS. L. REV. 441 (same).

ment right to due process of law.[74] In *Schall v. Martin*,[75] the Supreme Court upheld a statute authorizing pretrial preventive detention of juveniles. The Court held detention valid provided that it served legitimate state interests.[76] The Court emphasized that pretrial preventive detention must *in fact* further legitimate state ends.[77]

Pretrial preventive detention serves several legitimate state interests, including community safety, appearance at trial by the arrested person, and protection of jurors and witnesses. Detention protects the community by removing from the streets individuals who are likely to commit crimes.[78] The Supreme Court recognizes protection of the community as

74. In Zemel v. Rusk, 381 U.S. 1 (1965), the Supreme Court stated "[t]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." *Id.* at 14. A finding of restraint on the detainee's liberty is only the initial step in determining whether the detainee's constitutional rights are violated.

For general discussions of substantive due process and pretrial preventive detention, see generally Hruska, *supra* note 38; Meyer II, *supra* note 38; Portman, *supra* note 38; Thaler, *supra* note 73; Note, *Due Process and the Pretrial Detention Provisions of the Federal Criminal Code Reform Bill of 1981*, 47 ALB. L. REV. 645 (1983); Note, *Preventive Detention Before Trial*, *supra* note 38.

75. 104 S. Ct. 2403 (1984). In *Schall*, an accused juvenile delinquent challenged the constitutionality of his pretrial detention under the New York Family Court Act. The Act provides in part:

> 3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained; . . . (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.

N.Y. FAM. CT. ACT § 320.5(3)(b) (Consol. 1983).

76. 104 S. Ct. at 2409 (1984). The *Schall* Court found a government interest in protecting juveniles from their own folly, stressing the government's *parens patriae* interest in juveniles. *Id.* at 2410. With pretrial preventive detention of adults, no *parens patriae* interest exists. At first glance, this fact would appear to preclude application of *Schall* to a fact pattern involving the pretrial preventive detention of adults. The *Schall* analysis, however, does not depend upon the presence of a *parens patriae* interest and properly applies to the constitutional analysis of pretrial preventive detention of adults. The *parens patriae* interest in *Schall* is merely one of several legitimate state interests in the detention of juveniles.

77. *Id.* at 2412. *See also* Ingraham v. Wright, 430 U.S. 651, 671-77 n.40 (1977) (the due process clause, not the eighth amendment prohibition against cruel and unusual punishment, governs the constitutionality of pretrial detention).

78. The legislative history of the Bail Reform Act of 1984 indicates:

> [m]any of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.

S. REP. NO. 147, 98th Cong., 1st Sess. 1, 2-3 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3185. The court in United States v. Edwards, 430 A.2d 1321, 1341 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982), held the District of Columbia pretrial detention statute constitutional, concluding that "pretrial detention clearly has a substantial relation to preventing injury to the public and thus falls within the scope of Congress' power to legislate for the District of Columbia."

a legitimate and compelling state interest[79] and an important social objective.[80] Various national groups also promote preventive detention to ensure community safety.[81]

Like past bail acts, the 1984 Act ensures the defendant's appearance at trial.[82] The First Circuit recently described this government interest as legitimate.[83]

The Bail Reform Act of 1984 also recognizes a governmental interest in protecting prospective jurors and witnesses from defendants whom courts determine to be dangerous.[84] Preventive detention safeguards the

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79. De Veau v. Braisted, 363 U.S. 144, 155 (1960) (holding that the interest in combatting local crime is legitimate and compelling). *See also* United States v. Hazzard, 598 F. Supp. 1442, 1450 (N.D. Ill. 1984) (describing the government interest in crime prevention as legitimate and compelling).

80. Brown v. Texas, 443 U.S. 47, 52 (1979) (noting that a statute making refusal to identify oneself to a police officer a crime serves the weighty social objective of prevention of crime). The Supreme Court reaffirmed its positions in *DeVeau* and *Brown* on crime prevention in Schall v. Martin, 104 S. Ct. 2403, 2410 (1984).

81. *See, e.g.,* National District Attorneys Association, NATIONAL PROSECUTION STANDARDS: PRETRIAL RELEASE, Standard 10.8 (1977). Standard 10.8(A) provides:

> A. The prosecutor should recommend to the court, and the court shall have within its discretion the power to deny release and detain for trial those accused of serious felonies where one or more of the following conditions are met:
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> . . .
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> 3. In serious cases where there is a showing before the court that the defendant has threatened another person;
>
> . . .
>
> 6. Where the accused's past criminal record indicates such a history of recidivism that his release would pose a danger to others;
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> 7. Any other factors which are shown to the court that indicate a likelihood that release would result in a private or public harm.

See also American Bar Association, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE, Standards 10-5.1, -5.2, -5.9 (1978); National Conference of Commissioners on Uniform State Laws, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 341 (1974); National Association of Pretrial Service Agencies, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION, Standard VII.

The legislative history of the Bail Reform Act of 1984 demonstrates that Congress noted the positions of these national groups. S. REP. NO. 147, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4, 3188-89.

82. *See, e.g.,* Bail Reform Act of 1966, 18 U.S.C. § 3146(a), *repealed by* Bail Reform Act of 1984.

83. United States v. Jessup, 757 F.2d 378, 386 (1st Cir. 1985).

84. The Bail Reform Act of 1984 sets the standard for the release-detention decision as that which will "reasonably assure the appearance of the person as required or will [not] endanger the safety of *any other person* or the community." 18 U.S.C. § 3142(c), reprinted *supra* note 12 (emphasis added). The legislative history of the Bail Reform Act of 1984 indicates Congress' intent in enacting this phrase: "The reference to safety of any other person is intended to cover the situation in which the safety of a particular, identifiable individual, perhaps a victim or witness, is of concern." S. REP. NO. 225, 98th Cong., 1st Sess. 39 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS,

well-being of jurors and witnesses. Preventive detention thereby facilitates the effective functioning of the criminal justice system by eliminating these individuals' fear of reprisal from defendants.[85] Legislatures and courts repeatedly affirm the importance of the state's interest in the effective functioning of the criminal justice system by enacting and upholding bail provisions designed to ensure the arrested person's appearance at trial. The presence of jurors and witnesses at trial is an essential ingredient for an effective criminal justice system.[86]

In addition to satisfying the *Schall* due process test, pretrial preventive detention under the Bail Reform Act of 1984 must not constitute punishment.[87] In *Bell v. Wolfish*,[88] the Supreme Court held that not all pretrial

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at 3195. *See also* United States v. Williams, 753 F.2d 329, 335 (4th Cir. 1985) (the risk that defendant will continue to sell narcotics is included in definition of dangerousness).

The Bail Reform Act of 1984 codified the common-law recognition of the power of courts to deny bail to defendants who pose a danger to witnesses. *See supra* notes 62-66 and accompanying text.

85. *See, e.g.*, Bail Reform Act of 1966, 18 U.S.C. § 3146, *repealed by* Bail Reform Act of 1984; *see also* Stack v. Boyle, 342 U.S. 1, 5 (1951).

86. *See* United States v. Hazzard, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984).

The government has an interest in upholding the integrity of the judicial system. The legislative history of the Bail Reform Act of 1984 indicates Congress' concern that judges faced a "desperate dilemma" — releasing a person likely to commit more crime versus imposing high money bond "ostensibly for the purpose of assuring appearance, but actually to protect the public." S. REP. NO. 147, 98th Cong., 1st Sess. 1, 37 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 13. Congress feared that this practice "tainted the fairness of release procedures." *Id.* at 11, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3193. Ultimately, Congress concluded that providing statutory authority for preventive detention would allow courts to honestly address the issue of pretrial criminality. In addition, the government would have the burden of proving dangerousness, and the defendant would have the opportunity to respond. *Id.* at 11, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3194.

The defendant has a countervailing interest in remaining free from physical restraint. Although this liberty is a fundamental right, compelling state interests can outweigh it. *See supra* note 74. The state's interests include protecting the community, witnesses, and jurors, as well as promoting the effective functioning of the criminal justice system. These interests are compelling, and they outweigh the defendant's interest in liberty prior to trial. *See supra* notes 78-81.

The legislative history of the Bail Reform Act of 1984 displays Congress' careful balancing of the state's interests against the defendant's interests:

> The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interests in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate.

S. REP. NO. 225, 98th Cong., 1st Sess. 37 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3189-90.

87. *See supra* note 74.

88. 441 U.S. 520 (1979). In *Bell*, the Court determined that punishment did not exist in the context of challenges to specific practices and conditions of confinements at a federally-operated

restrictions constitute punishment; otherwise, pretrial detention for any reason would violate due process.[89] The *Bell* Court established a two-part test for determining whether conditions of pretrial detention constitute punishment.[90] A court must show a purpose for detention other than punishment, and it must evaluate the excessiveness of the detention relative to the articulated purpose.[91]

Congress did not enact the Bail Reform Act of 1984 to punish pretrial detainees. Rather, Congress intended to protect the community and prospective witnesses and jurors from potentially dangerous persons[92] and to ensure the appearance of arrested persons at trial.[93]

Congress tailored the Bail Reform Act of 1984 so that pretrial preventive detention does not exceed its purpose of protecting society.[94] The Act provides for an immediate detention hearing with strict limits on the

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custodial facility in New York City designed primarily to house pretrial detainees. The challenged practices included double-bunking, prohibitions against detainees' receipt of packages and books, and body searches after a contact visit with outside persons.

89. *Id.* at 537.

90. *Id.* The *Bell* Court relied on the test established in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963). The *Kennedy* test included a review of the following factors to determine the existence of punishment:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69.

91. 441 U.S. at 538-39.

In Schall v. Martin, 104 S. Ct. 2403 (1984), the Court reaffirmed *Bell*'s focused inquiry and held that pretrial preventive detention of juveniles is not punishment. *Id.* at 2415.

In United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982), the court applied the *Kennedy* test, *see supra* note 90, and upheld preventive detention under D.C. CODE ANN. § 23-1322(a)(1). Focusing on the alternative purpose and reasonably tailored factors, *see supra* note 90, the court stated that preventive detention is not historically regarded as punishment and does not promote traditional aims of punishment. 430 A.2d at 1332-33.

92. *See* United States v. Hazzard, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984) ("the legislative history indicates not an intent to punish but rather an intent to protect the community against persons likely to endanger it. . . . Pretrial detention does not punish past conduct but rather protects the community from reasonably predictable future conduct.").

See also United States v. Edwards, 430 A.2d 1321, 1332 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982) (upholding the alternative purpose of protecting the community).

93. *See supra* notes 84 & 92.

94. *See* United States v. Jessup, 757 F.2d 378, 387 (1st Cir. 1985) ("We find no legal basis for viewing the presumption [that one charged with a serious drug offense will likely flee before trial] as imposing 'punishment.' ").

length and availability of continuances.[95] It also mandates prompt review of and appeal from detention orders.[96] These provisions limit the length of detention should a court determine pretrial detention to be unnecessary.[97] The Act also orders corrections officials to house pretrial detainees separately from convicted persons serving sentences or awaiting appeal.[98] In addition, the Act provides for the temporary release of detainees for trial preparation or other compelling reasons.[99] These provisions are inconsistent with a view of pretrial detention as punishment. Rather, the provisions demonstrate that Congress tailored pretrial preventive detention under the Bail Reform Act of 1984 to effect its purpose of protecting society from crime.

Because pretrial preventive detention serves legitimate state interests and does not constitute punishment of the detainee, detention under the Bail Reform Act of 1984 satisfies substantive due process requirements.

C. Procedural Due Process

The Bail Reform Act of 1984 must establish procedures to protect an arrested person's liberty interests[100] in order to satisfy procedural due process under the fifth amendment.

In *Gerstein v. Pugh*,[101] the Supreme Court held that a judicial probable cause determination is a prerequisite to extended restraints on the liberty

95. 18 U.S.C. § 3142(f), reprinted *supra* note 16.

96. 18 U.S.C. § 3145, reprinted *supra* note 36.

97. The *Edwards* court and the *Schall* Court both considered the length of the detention in determining the constitutionality of pretrial preventive detention. 430 A.2d at 1333 and 104 S. Ct. at 2413. Both courts relied in part on the statutory limitation of the length of pretrial detention to provide protection for the arrested person. 430 A.2d at 1333 and 104 S. Ct. at 2413. Although the Bail Reform Act does not limit the length of pretrial detention, "any period of federal pretrial detention is limited by the constraints of the Speedy Trial Act." U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 15 n.11 (1984).

98. 18 U.S.C. § 3142(i), reprinted *supra* note 36.

99. *Id.*

100. *See* United States v. Edwards, 430 A.2d 1321, 1333-34 (D.C. 1981), *cert. denied*, 445 U.S. 1022 (1982) ("Although pretrial detention is not punishment, it clearly implicates a liberty interest that requires a fair hearing within the mandates of procedural due process."). *See generally* Note, *Due Process and the Pretrial Detention Provisions*, *supra* note 74.

101. 420 U.S. 103 (1975). In *Gerstein*, the petitioners claimed a constitutional right to a judicial hearing on probable cause for detention. *Id.* at 107. The Supreme Court held that "the Fourth Amendment's protection against unfounded invasions of liberty and privacy" requires a neutral and detached magistrate to determine the existence of probable cause to detain an arrested person. *Id.* at 112.

of arrested persons.[102] Recommending flexibility and experimentation in hearing procedures,[103] the Court held that the Constitution does not require a "full panoply of adversary safeguards" in the determination of probable cause.[104] Although the Court decided *Gerstein* on fourth amendment grounds, it later recognized that flexibility and experimentation are also desirable in a fifth amendment due process context.[105]

In *Mathews v. Eldridge*,[106] the Supreme Court established a test also to determine whether detention procedures satisfy due process. Under the *Mathews* test, a court must balance the interests of the arrested person against the interests of the government and the risk of erroneous deprivation of liberty under the established procedures.[107]

The arrested person's interests center on the right to freedom from physical restraints.[108] The government's interests center on protection of the community and of prospective witnesses and jurors[109] and on the effective functioning of the criminal justice system.[110]

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102. *Id.* at 114.

103. *Id.* at 119. The Court commented that adversary safeguards such as counsel, confrontation, cross-examination, and compulsory process for witnesses are not essential for the probable cause determination. *Id.* at 120. The Third Circuit held that *Gerstein* controls inquiries regarding detention hearing procedures under the Bail Reform Act of 1984. United States v. Delker, 757 F.2d 1390, 1397 (3rd Cir. 1985).

104. 420 U.S. at 123.

105. Schall v. Martin, 104 S. Ct. 2403, 2415 (1984). *See also* United States v. Edwards, 430 A.2d 1321, 1336 (D.C. 1981), *cert. denied,* 445 U.S. 1022 (1982) ("Because due process is flexible and calls for such procedural protections as the particular situation demands, . . . an independent examination must be made of the due process requirements for pretrial detention.").

106. 424 U.S. 319, 349 (1976) (due process does not require a hearing prior to termination of Social Security disability benefits).

107. *Id.* at 335. The Court outlined the test:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

108. The arrested person might argue that he has a sixth amendment right to release from custody in order to effectively prepare his defense. The 1984 Act, however, specifically provides for temporary release of the detainee for the purpose of trial preparation. 18 U.S.C. § 3142(i).

109. *See supra* notes 78-81 and accompanying text.

110. *See supra* notes 82-86 and accompanying text.

In United States v. Edwards, 430 A.2d 1321, 1337 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982), the court examined the procedures provided in D.C. CODE ANN. § 23-1322 and concluded "[t]he government has an obvious interest in not conducting a full-blown criminal proceeding twice, once for pretrial detention and a second time for the trial on the charges."

The Bail Reform Act of 1984 minimizes[111] the risk of erroneous deprivation of liberty through extensive procedural provisions.[112] Under the Act, an arrested person has the right to counsel, including appointed counsel if he is indigent, the right to testify, the right to present witnesses, the right to cross-examine government witnesses, and the right to present evidence.[113] In addition, the Act requires the judge to support findings of the arrested person's dangerousness with clear and convincing evidence[114] and to prepare a written statement of reasons for the detention.[115] Finally, the Act provides for expedited review of detention orders.[116]

Arguably, some risk of erroneous deprivation of liberty arises from the difficulties inherent in predicting an arrested person's potential danger to the community.[117] The courts, however, have uniformly rejected this contention, maintaining that the legislatures have predicted future crimi-

111. The First Circuit found that the presumption that a drug offender is likely to flee "does not significantly increase the risk of an 'erroneous deprivation' of liberty" under the *Mathews* test. United States v. Jessup, 757 F.2d 378, 386 (1st Cir. 1985) (discussed at *supra* note 94).

112. Congress modeled the procedural safeguards contained in the Bail Reform Act of 1984 after those provided in the District of Columbia statute. The District of Columbia Court of Appeals upheld the statute on procedural due process grounds. United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982). *See also* Blunt v. United States, 322 A.2d 579 (D.C. 1974) (discussed *supra* note 66).

113. 18 U.S.C. § 3142(f), reprinted *supra* note 16. Section 3142(f) also provides that the rules of evidence do not apply to the detention hearing. The Bail Reform Act of 1966 also barred the application of the rules of evidence. Bail Reform Act of 1966, 18 U.S.C. § 3146(f), *repealed by* Bail Reform Act of 1984.

In United States v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985), the court rejected the defendant's argument that the Bail Reform Act of 1984 forbade reliance upon hearsay:

> Congress, in enacting the new Bail Act, did not change pre-existing law, which, as a general matter, allowed a magistrate or judge to consider hearsay evidence and to rest a determination upon that evidence where it is sufficiently reliable.

Id. at 208.

114. For a reprint of 18 U.S.C. § 3142(f), see *supra* note 16. The legislative history of § 3142(f) demonstrates that the clear and convincing standard is a rigorous one. S. REP. NO. 225, 98th Cong., 1st Sess. 22 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3205.

In United States v. Edwards, 420 A.2d 1321, 1339 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982), the court upheld the constitutionality of the "substantial probability" standard in D.C. CODE ANN § 23-1322 as "higher than [the] probable cause" required in *Gerstein.* In passing the 1984 Act, Congress specifically rejected a "substantial probability" standard. S. REP. NO. 225, 98th Cong., 1st Sess. 44-45 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4, 21.

115. 18 U.S.C. § 3142(i), reprinted *supra* note 36.

116. 18 U.S.C. § 3145, reprinted *supra* note 36.

117. *See* Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982), discussed *supra* note 44. In *Hunt,* the Eighth Circuit emphasized the need to avoid erroneous deprivations of the liberty of arrested persons by holding that under the eighth amendment, arbitrary denial of bail is equivalent to excessive bail. *Id.* at 1158.

nal conduct in other contexts.[118] The President's Commission on Crime in the District of Columbia has found that courts are capable of identifying dangerous persons.[119] In passing the Act, Congress determined that a rational relationship exists between the two rebuttable presumptions[120] and an accurate prediction of the arrested person's dangerousness.[121]

The detention hearing procedures established by the Bail Reform Act of 1984 satisfy the requirements of procedural due process. The procedures minimize the risk that courts will erroneously deprive an arrested person of his liberty. The government's interests in community safety and the arrested person's trial appearance outweigh the arrested person's liberty interest.[122]

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118. In Schall v. Martin, 104 S. Ct. 2403 (1984), the Supreme Court noted "that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, . . . that it is impossible to predict future behavior." *Id.* at 2417-18.

In drafting the Bail Reform Act of 1984, Congress carefully considered the issue and concluded that predicting dangerousness does not constitute a serious risk of erroneous deprivation of an arrested person's liberty. S. REP. NO. 147, 98th Cong., 1st Sess. 9-10 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3192-93.

119. President's Commission on Crime in the District of Columbia, Report 596 (1966), *cited in* S. REP. NO. 147, 98th Cong., 1st Sess. 1, 22 (1983).

120. 18 U.S.C. § 3142(e), reprinted *supra* note 14.

121. The Committee on the Judiciary noted that "a history of pretrial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community safety and that he cannot be trusted to conform to the requirements of the law while on release." S. REP. NO. 147, 98th Cong., 1st Sess. 45-46 (1983), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4, 22. The Committee stated:

> It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. . . . Similar obvious considerations based upon the inherent dangers in committing a felony using a firearm support a rebuttable presumption for detention.

Id. at 23. *See also* United States v. Aiello, 598 F. Supp. 740, 744-45 (S.D.N.Y. 1984) (upholding this presumption and concluding that once the presumption is triggered, the defendant bears the burden of production and persuasion).

Compare Hunt v. Roth, 648 F.2d 1148, 1164 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (*irrebuttable* presumption of dangerousness violates federal constitution).

122. The arrested person who is detained pretrial might argue that the detention violated his right to equal protection under the fifth amendment's due process clause. The Bail Reform Act of 1984, on its face, distinguishes between dangerous and nondangerous arrested persons. Because detention abridges an arrested person's fundamental right to physical liberty, courts would strictly scrutinize the detention. Under strict scrutiny, pretrial preventive detention must be necessary to further a compelling governmental end. Pretrial preventive detention is necessary to prevent detainees from committing crimes. The pretrial detainee's equal protection claim, therefore, would not be successful. *See generally* Meyer II, *supra* note 38.

In United States v. Hazzard, 598 F. Supp. 1442 (N.D. Ill. 1984), Hazzard argued that no rational

IV. CONCLUSION

Pretrial preventive detention under the Bail Reform Act of 1984 is constitutional. The Act does not violate the eighth amendment's prohibition against excessive bail or the fifth amendment's guaranty of due process.[123] The authorization of pretrial preventive detention is a significant congressional step towards reducing crime in the United States.

JoAnne Levy

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distinction exists between dangerous persons who are charged with a crime and those who are not charged with a crime. *Id.* at 1452. The court rejected this variation of an equal protection argument:

> [T]he Equal Protection Clause does not require that [Congress] must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that [Congress'] action be rationally based and free from invidious discrimination.... The Act here challenged satisfies that standard.

Id. at 1452.

Professor Tribe argues that the pretrial detainee could claim that his preventive detention is an unconstitutional punishment of status, *i.e.*, the status of being dangerous. Tribe, *supra* note 60, at 394-96. *See also* Robinson v. California, 370 U.S. 660 (1962) (a violation of the eighth amendment's cruel and unusual punishment clause and the fourteenth amendment's due process clause exists when the state makes being a narcotics addict a crime). The Supreme Court's holding in Bell v. Wolfish, 441 U.S. 520 (1979), that pretrial detention does not constitute punishment, forecloses this argument.

The detainee might also claim a violation of the ex post facto clause of U.S. CONST. art. 1, § 9 because the Bail Reform Act of 1984 applies to persons whose crimes were committed before October 12, 1984, the date of the Act's enactment. *See, e.g.*, United States v. Cirrincione, 600 F. Supp. 1436, 1445 (N.D. Ill. 1985) (detention pending appeal of pre-Act arrestees violates ex post facto clause). Even assuming some merit attaches to this finding, there is no merit in an ex post facto challenge to *pretrial* preventive detention. Because pretrial detention is regulatory and not punitive, *see* Bell v. Wolfish, 441 U.S. 520 (1979), *supra* notes 88-91 and accompanying text, no enhancement of punishment occurs when pretrial detention becomes more likely under the Bail Reform Act of 1984 than under the Bail Reform Act of 1966.

The *Cirrincione* court noted the distinction between pre and postconviction detention:

> To the extent that the post-conviction bail provision of the new Act is regulatory and not punitive, it necessarily falls outside the provisions of the Ex Post Facto Clause. However, unlike the pretrial detention provisions which are concerned solely with the safety of the community, the post-conviction bail restrictions are not unrelated to punishment nor merely incidental to regulation of a present situation.

600 F. Supp. at 1436.

123. *See supra* notes 38-122 and accompanying text.